

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

PETER CORNELIUS THURMAN,

Plaintiff,

v.

GORDON R. ENGLAND, Secretary of the  
United States Navy,

Defendant.

Case No. C04-5203FDB

ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS AND/OR FOR  
SUMMARY JUDGMENT

This matter is before the Court on the motion of Defendant Gordon England, Secretary of the United States Navy, pursuant to Rules 12(b)(1), (6) and 56( c) of the Federal Rules of Civil Procedure, to dismiss Plaintiff Peter Thurman's Complaint for lack of jurisdiction, for failure to state a claim upon which relief can be granted, and for summary judgment. By Order dated July 29, 2005, Plaintiff was ordered to show cause in writing no later than August 10, 2005, sufficient to satisfy the Court that Plaintiff is represented by counsel or will be representing himself pro se and is aware of his obligation to prosecute this action. Plaintiff has failed to respond to the Court's Order. Accordingly, the Court will proceed with consideration of Defendant's motion to dismiss, response filed by Plaintiff, the affidavits and memoranda filed in support of the motion, and the balance of the record. Having considered these, the Court finds that Defendant's motion shall be granted.

ORDER - 1

## I.

In determining a motion to dismiss for failure to state a claim upon which relief can be granted, the Court must construe the complaint in the light most favorable to plaintiff. Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9<sup>th</sup> Cir. 1995). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 102 (1957); Parks, 51 F.3d at 1484. The Court must assume all material facts contained in the Complaint are true and indulge all inferences in favor of the plaintiffs. In re Stac Electronics Sec. Litig., 89 F.3d 1399, 1403 (9<sup>th</sup> Cir. 1996).

If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts which show a triable issue. Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). Summary judgment is proper if the moving party shows that there is no evidence which supports an essential element to the non-moving party's claim. Celotex, 477 U.S. 317 (1986). The substantive law governs whether a fact is material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). After the moving party has made its required showing, the non-moving party cannot simply rest on the conclusory allegations in their pleadings. Fed.R.Civ.P. 56(e).

Although the Court must construe pleadings of pro se litigants liberally, the Court may not supply essential elements to the complaint that may not have been initially alleged. Ivey v. Board of Regents, 673 F.2d 266, 268 (9<sup>th</sup> Cir. 1982). Similarly, in civil rights actions, a court may not supply essential elements of the claim that were not initially pled. Pena v. Gardner, 976 F.2d 469, 471 (9<sup>th</sup> Cir. 1992).

## II.

Plaintiff Peter C. Thurman, an African American male, born January 1, 1961, has filed a complaint against the Secretary of the Navy alleging that he was discriminated against on the bases

1 of race, sex, age and that he was retaliated against in violation of Title VII of the Civil Rights Act of  
2 1964, as amended, 42 U.S.C. §2000e *et seq.* (Title VII) and the Age Discrimination in Employment  
3 Act, 29 U.S.C. § 633a (ADEA).

4  
5 The complaint contains no factual allegations but incorporates by reference the formal EEO  
6 complaint filed by Plaintiff Thurman on October 9, 2003. The specific allegations contained in  
7 Plaintiff Thurman's EEO complaint are as follows:

- 8 "1. Individuals speak with each other, but not to me. This silent treatment began upon  
9 my arrival. This silent treatment, coupled with random office hostilities (see 1-12),  
10 management's refusal to provide timely support of my work (HVAC assignments, but  
11 not HVAC training time) and the fact that I'm the only non-white engineer in office,  
12 leads me to conclude I'm a "token black" (May 003 - Present).
- 13 2. Individuals held a disruptive and increasingly large talk at my desk, then cursed  
14 instead of apologized, when I asked them to disburse (July 003).
- 15 3. An individual looked me square in the eye as I sat at my desk, then loudly feigned  
16 spitting (July 003).
- 17 4. Individuals who do not speak to me, daily feign spitting at their desks (July 003 -  
18 Present).
- 19 5. Individuals placed the office paper recycle bin (a very large container) at my desk  
20 (Aug. 003).
- 21 6. Individuals sabotaged my office by removing some tape uniquely used to secure metal  
22 supports for a mirror at my desk (Aug 003).
- 23 7. An individual entered my office without my permission and for unknown reasons,  
24 leaving my desk in disarray and my guests chair blocking access to my desk (Aug  
25 003).
- 26 8. Individuals vandalized my auto (Jeep Wrangler, WA lic 228-MCK) numerous times at  
work consisting of loosened bolts, punctured tire, window slash and decorating (an  
artificial ass-tail was tied to my bumper with govt hardware) (Aug 003).
9. An individual blocked an office doorway, restricting my access through the doorway;  
this act took place next to the office copier and was witnessed by a coworker, Mr.  
Nick Ferderer (Aug 003).
10. Coworker Charlie Hanff cut short a discussion between himself and myself by calling  
me out of my name (A\_hole") as I attempted to discuss a task I'd given him, then

Hanff followed me to my desk to continue his verbal barrage, refusing to leave inspite of my request for him to do so. Supervisor (Earl McCarthy) tells me that "I don't get alone with anyone", after I reported incident to him, thus implying I will receive disciplinray action. Supervisor speaks with both Hanff and myself, states problem began at Hanff's desk and Hanff had responded to my negative comments on his work. I'm not aware of any disciplinary action against Hanff, not even a verbal reprimand for calling me out of my name (Sept).

11. My 2<sup>nd</sup> level supervisor (William Nielsen) calls both Earl and myself into his office to discuss status of my work. I state I do not know if I will be able to complete a couple of projects by their due date, and Nielsen responds by speaking to me in private. Nielsen states he never wanted to hire me; I've done nothing right since I was hired Sept 99; I played no part in the good work by Public Works last year; he regrets promoting me to GS-12 engineer; my work is assigned to others (Jim Knapp, Rich Crain and Jim Luddon and Coworkers do not appreciate doing my work while I get paid "all that money"; the most important work aspects are Schedule; Budget and remaining off "Overdue list"; he cannot afford to employee a GS-112 engineer who does not have adequate output; if he must meet with me again, he will have to make a decision that neither he nor I wants. When I ask what must I do to change his opinion of me, Nielsen states I must complete work on-schedule, stay within budget and stay off "overdue list" (Sept 003).

12. Supervisor Earl McCarthy states I do not want to work, and I respond by refuting that statement and leaving the office for the remainder of that day and following day (September 003)."

(Plaintiff's EEO Complaint).

### III.

It is unclear from the foregoing whether Plaintiff Thurman is alleging disparate treatment or a hostile work environment based on harassment. The allegations on their face and standing alone do not describe behavior that can be considered discriminatory. Specific evidence sufficient to satisfy each element of each type of discrimination alleged is required.

(a) Disparate Treatment. To establish a prima face case of discrimination based on gender, race or national origin, Plaintiff must show that he (1) belongs to a protected class, (2) was performing according to his employer's legitimate expectations, (3) was subject to an adverse employment action, and (4) similarly situated individuals outside of his protected class were treated more favorably. *See, Reeves v. Sanderson Plumbing*, 530 U.S. 133, 142 (2000); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998).

Two of Plaintiff's allegations involve management action which could arguably give rise to a disparate treatment claim - (1) that Plaintiff was denied training and (2) that his supervisor accused him of not wanting to work. Plaintiff cannot make a prima facie case relating to his claim for denial of training, however, because he has not identified any specific training that he asked for and was denied. In addition, there is no evidence that other employees were treated more favorably under the same circumstances. As to Plaintiff's second allegation, the undisputed facts reveal that he was given a letter of reprimand because he did not follow the procedures for requesting leave and having his leave approved prior to leaving work. Plaintiff acknowledges that he did not follow the appropriate procedures. As with the first allegation, Plaintiff has provided no evidence that other employees were treated more favorably under the same circumstances. Thus, Plaintiff's claim of disparate treatment cannot stand.

(b) Hostile Environment. To establish a prima facie case of a hostile work environment due to racial based harassment, Plaintiff must show that (1) he was subjected to verbal or physical conduct directed at him because of his race, national origin or gender; (2) this conduct was unwelcome; and (3) the conduct was severe or pervasive enough to alter the conditions of employment and create an abusive working environment. *Meritor v. Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Manatt v. Bank of America*, 339 F.3d 792, 798 (9<sup>th</sup> Cir. 2003).

An objectively hostile or abusive work environment is one that a reasonable person would find hostile and abusive as well as one that the victim subjectively perceives as hostile and abusive. *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993). Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment - an environment that a reasonable person would find hostile or abusive - is beyond Title VII's purview. *Id.* at 370. "... [the] conduct must be extreme to amount to a change in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2257 (1998).

1 The Court finds that, at the very least, Plaintiff must show either racially derogatory remarks  
2 or harassing conduct directed at him because of his race. However, a review of the allegations listed  
3 by Plaintiff fails to reveal any such remarks or conduct. For example, Plaintiff complains that one co-  
4 worker cursed during when told to stop talking, but he acknowledges that the conversation was not  
5 directed at him, that there were no racial overtones to the conversation, and that, although he could  
6 not hear what the employee said, he assumed the employee had cursed. As to the employees whom  
7 Plaintiff alleges “feigned spitting,” there is no evidence that by doing so, these employees were  
8 attempting to racially harass the Plaintiff and Plaintiff acknowledges that he did not report to  
9 management that he believed he was being harassed. Plaintiff also alleges that an individual blocked  
10 his way into a doorway, but when questioned, admitted that the person was using a copy machine  
11 and moved out of his way when he said “excuse me.” The allegation involving a co-worker calling  
12 Plaintiff an “asshole” does involve conduct directed at the Plaintiff, but here again, there is no  
13 evidence that the conduct was racially motivated.

14 Because Plaintiff has shown no racially derogatory remarks or harassing conduct directed at  
15 him because of his race, his claims of hostile environment must fail.

16 (c) Retaliation. To establish a prima facie case of retaliation, Plaintiff Thurman must  
17 produce specific and substantial evidence that he (1) engaged in statutorily protected activity; (2)  
18 thereafter suffered an adverse employment action at the hands of his supervisors and (3) a causal link  
19 exists between his protected activity and the adverse employment action. *Vasquez v. County of Los*  
20 *Angeles*, 307 F.3d 884, 896 (9<sup>th</sup> Cir. 2002); *William Ray v. William Henderson, Postmaster General*,  
21 217 F.3d 1234, 1239 (9<sup>th</sup> Cir. 2000); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9<sup>th</sup>  
22 Cir. 1994). Plaintiff Thurman must present evidence sufficient to raise an inference that his protected  
23 activity was the “likely reason” for the adverse action. *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793,  
24 796 (9<sup>th</sup> Cir. 1982).

1 In this case, the only allegation which could arguably give rise to a retaliation claim is the  
2 allegation concerning Plaintiff's supervisor denying him sick leave and giving him a letter of  
3 reprimand. Plaintiff cannot show that he suffered an adverse action by receipt of the letter of  
4 reprimand, however, as the Court does not believe that its receipt rises to the level of an adverse  
5 action. Indeed, even if it did, there is no requisite causal link between the letter of reprimand, which  
6 Plaintiff Thurman received in September of 2003, and his prior EEO activity, which occurred in  
7 2000. The elapsed time of almost two years is too long to allow an inference of a causal link. *See,*  
8 *Manatt v. Bank of America*, 339 F.3d 792, 802 (9<sup>th</sup> Cir. 2003).

9 To defeat summary judgment, Plaintiff Thurman must also show pretext. *Wallis v. J.R.*  
10 *Simplot Co.*, 26 F.3d 885 (9<sup>th</sup> Cir. 1994). However, there is no evidence that the letter of reprimand  
11 was issued in retaliation. Rather, the evidence indicates that Plaintiff Thurman was given a letter of  
12 reprimand because he left his place of employment without following the procedures for requesting  
13 leave despite having been previously advised that he needed to do so. Plaintiff Thurman has  
14 presented no specific and substantial evidence to this Court that the reason given by Defendant for  
15 issuance of the letter of reprimand was a pretext for retaliation.

16 ACCORDINGLY,


17 IT IS ORDERED:

18 (1) Defendant's motion to dismiss and/or for summary judgment (Dkt. #15) is

19 **GRANTED;** and

20 (2) Plaintiff's claims against Defendants are dismissed with prejudice.

21 DATED this 15th day of August, 2005.

22  
23   
24 FRANKLIN D. BURGESS  
25 UNITED STATES DISTRICT JUDGE  
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